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VIRGINIA LAW REGISTER

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Issued Monthly at \$5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS

The Editor-in-Chief desires to express his cordial appreciation of the excellent editorial work his associates did during his absence; and his deep regret that one of them has ended his work in this world. To associate with Mr. Savage was alike pleasurable and profitable to any one old or young and his career was so full of promise that those who knew him realize very keenly what a loss his early death was to his profession and friends.

Legal business called the Editor to London and nothing but legal business of the most pressing kind would ever induce him to visit London in the month of February again. The weather was bad enough, but the lack of fuel and the careful conservation of it made one feel the weather was beyond all expression horrible. It must have been during February in London that some wit thanked God that the month had only twenty-eight days in it. "Had it had thirty," said he, "No one could have lived through it."

Our business brought us in touch with one of the finest types of English solicitors and with the most genial and kindly clerk of the firm who attended to all of the business. We were much surprised to learn that a holograph will is no longer valid in England and that an attestation clause is necessary, setting out the facts of the signature, etc., as in Virginia; and that this attestation clause is accepted as proof and the witnesses to the will are not required to prove it either in the Register's office or in court. The will with the attestation clause is taken to Somerset House in London and is at once probated. The executor is not required to appear at all at any public office. He is simply sworn by some one called a commissioner of oaths, in some of-

fice—maybe a solicitor's—or the commissioner may himself be a solicitor. Our commissioner might have stepped out of the pages of Dickens—a smooth-faced, ruddy, genial gentleman—and made us take innumerable oaths on a tiny little testament, most of said oaths referring chiefly to the inventory of the estate, which is filed by the executor and no appraisers appointed. No security is required of an executor unless the will calls for it—reversing the Virginia rule. No commission is allowed an executor, he being supposed to act from high motives of friendship. If the executor happens to be a solicitor he can make no charges for services unless the will authorizes it, and so one sees in most English wills drawn by lawyers, where the executor is a solicitor, a clause allowing all proper fees and charges to be made.

The offices of our solicitors were in a comparatively modern building only about a hundred and fifty years old and in the Square of Gray's Inn, in the center of which stands the bronze statue of the great Francis Bacon—Lord Verulam—who was a Bencher of Gray's Inn. Very uncomfortable Francis looked, too, in his ruff and doublet and trunk hose, with the perpetual rain dripping from every available dripping place and the yellow fog swaying around him. He was a Bencher of the Inn, as was my Lord Coke, Lord Raymond, Sir Samuel Romilly, John Hampden, Sir Philip Sidney, John Pym, William Camden and Dugdale. The Duke of Connaught is a Bencher of the Inn.

The beautiful, though small, hall of the Inn is just opposite the suite of rooms of our solicitors. It was rebuilt in 1556. It has a raised dais and "high" table at the east end, and characteristic Tudor bay window on the north side. A very handsome oak screen richly carved with Renaissance ornaments and divided into round arched bays by Ionic columns conceals the vestibule. Above the enriched cartouche frieze of the screen is an open and carved balustrade, extremely handsome. A fine open timber roof of the hammer beam type covers this charming room and harmonizes with the eighteenth century oak panelling which lines the walls and is decorated with the arms of the Treasurers. The dignified porter who shows you the hall tells you that the oak was from the Spanish Armada. The Middle

Temple Hall makes the same claim. On the walls of the hall hang portraits of Kings Charles I and II; of the Bacons—Sir Nicholas and Francis—of Coke and Romilly, and many others. There is a very fine portrait of good Queen Bess hung above the dais which was presented to the Society by one of the Masters of the Bench. On the Grand Day in each term “the glorious, pious and immortal memory of good Queen Bess” is still solemnly drunk in Hall. This hall, one of the most venerable and beautiful of all the halls of London, remains practically the same as when Shakespeare’s “*Midsummer Night’s Dream*” was presented in it, the Bard himself being stage manager and Queen Bess amongst the spectators. Only a few of the splendid stained glass windows were in place, when we visited the hall on a “dumb dim dripping” afternoon in March. They had been taken down to avoid the damage which the Hun air raids threatened. Several incendiary bombs fell in the squares of the Inn and one fell in a room adjoining the hall—fortunately it did little damage, though the repaired roof and ceiling and floor showed what its damnable intentions were.

We were refused admittance the first time we rung the bell near the “handle of the big front door,” which the “Ruler of the King’s Navee” might have polished, so bright it was. “No admittance except before eleven or after three,” the “gentleman” in full dress suit who dignifiedly answered our ring told us. “The Benchers are at lunch during these hours.” “Heavens!” we said, “do they take four hours for lunch?” With a smile of pity at our lack of knowledge he informed us that those were the hours when the Benchers could have lunch in the hall and so the public could not enter. Another day we came at the right hour and spent a very pleasant hour in the building. There are only thirty Benchers—and what a gorgeous hall they have in which to lunch.

It was in Gray’s Inn Square in the Fall of 1914 we saw drill sergeants putting ranks of young men through their paces, and as now we looked into the empty square, the rain dripping from the tall trees upon gravelled walks and turf yet green despite the “time o’ the year,” our heart grew for the moment ineffably sad as we thought of those splendid young fellows, many of

whom are sleeping now "in Flanders Field." The junior member of the firm of our solicitors lost his only son and the three sons of the senior member were all in service. But the English wear no mourning; they do not boast of anything their splendid navy and superb army have done.

We came back home with a renewed sense of admiration for the great British race and with a stronger pride and thankfulness for the knowledge that we too are of their blood and with the prayer that there may be an unbreakable alliance between all English speaking races to make the world a better world and to "compel" peace.

Whilst in the City of London during the month of February we were treated to a genuine old fashioned London fog. It commenced with a yellow mist which partially
Judicial Fog. concealed the outlines of all moving objects.

Figures seemed to be floating in a curious ether which whilst not denying their substance did not afford them any fixed shape until finally as the fog grew thicker one could not see an object three feet away.

One arises from the perusal of many of the opinions of the Supreme Court of the United States upon the respective rights of the State and Federal Government with the feeling that one's reasoning powers are in a fog: That the result of a combination of these decisions is to leave the law as doubtful as the outlines of a motor bus seen looming up the Strand, when you cannot tell whether it is going or coming, or whether it is a machine or a monster. Take the opinions rendered within the last few months and let us see the result:

Pure Oil Co. v. Minnesota, U. S. Advance Sheets for Jan. 1919, p. 25.

In the exercise of its police power a state may enact inspection laws, which are valid if they tend in a direct and substantial manner to promote the public safety and welfare or to protect the public from frauds and impositions when dealing in articles of general use as to which Congress has not made any conflicting regulations, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged even

though the property may be moving in interstate commerce and the discretion of the Legislature in determining the amount of an inspection fee will not lightly be disturbed by the courts when testing the validity of a state law *which is asserted* (italics ours) to be a revenue rather than an inspection law. And yet in a dozen cases the Court has held that if the inspection fee be obviously and largely in excess of the cost of inspection the act will be declared void because its operation constitutes an obstruction to and burden upon that commerce among the states the exclusive regulation of which is committed to Congress by the Constitution. *Postal Tel. v. Taylor*, 192 U. S. 64. And yet if the object of a law is to *raise revenue* how can it claim to be the exercise of the police power? And is the exercise of the police power to be regulated by the size of the fees charged? A revenue law is as absolutely separate and distinct from the police power as black is from white, and being a revenue law, the State surely ought to be the judge of the amount of revenue needed. And if the State can raise a revenue from articles transported in interstate commerce, what becomes of that clause in the Constitution which forbids any import duties upon them?

Payne v. Kansas, January 1919 Advance Sheets, p. 39.

A state may forbid the sale of farm produce on commission without an annual license to be procured from the State Board of Agriculture, upon a proper showing and a bond conditioned to make honest accounting, and may impose a license fee of \$10.00 without abridging constitutional rights and privileges of grain dealers carrying on business in the State or depriving them of the equal protection of the laws or taking their property without due process of law.

We thoroughly agree with the Court and yet time and again the same Court has decided that a state cannot exact a license fee of a peddler or merchandise broker taking orders for goods from another state, even though the same fee is charged a resident peddler or merchandise broker.

The evils incident to the business of commission merchants are surely no greater than many connected with the "picture enlarger" or the merchandise broker. And yet the Court on p. 57 in *Walker v. Michigan* of same number holds that a peddler

may canvass and take orders from house to house for things transmitted in interstate commerce despite a state ordinance—we may suppose for revenue—to the contrary. In this case, however, the poor devil sold two cans of toilet cream that were *at rest* in the state and therefore his conviction was sustained.

Suppose the license fee in this case had been asserted to be a revenue law and was for a small amount, why shouldn't it come under the "police power?"

In the case of *U. S. v. Doremus*, Advance Sheets Lawyers Co-op. for April, p. 282, Doremus was indicted for violating Section 2 of the "Drug Act." Upon demurrer to the indictment the District Court held the act unconstitutional for the reason it was not a revenue act (which undoubtedly it was not), but the Supreme Court reversed this decision, holding it was not sufficient to invalidate the taxing power given to Congress by the Constitution that the same business may be regulated by the police power of the State and that the Act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as raising revenue. The Chief Justice with J. J. McKenna, Van Devanter and McReynolds dissented, the Chief Justice being of opinion that the Act of Congress in so far as it embraced the matters complained of was beyond the Constitutional power of Congress to enact, because to such extent the statute was a mere attempt by Congress to exert a power not delegated; that is, the reserved police power of the states, and in *Webb v. U. S.*, p. 285, same number, the Court held (the same Justices dissenting) that Congress had power to prohibit retail sales of morphine by druggists to persons who had no physician's prescription and could not have any because no order blanks were to be issued by the Government, because in the act an excise was laid. We do not think the destruction of States Rights has gone any further than these decisions, since 1865.

In *Union Dry Goods Co. v. Georgia Pub. Service Corp.*, p. 116, Advance Sheets Lawyers Co-op., p. 116, the Court very properly holds "That private contract rights must yield to public welfare when the latter is appropriately declared and defined and the two conflict, and that reasonable rates for electric power

and lights prescribed by a state in the exercise of its Police Power, through the instrumentality of a railroad commission are not repugnant to the contract clause or due process of law clauses of the Federal Constitution merely because if given effect they will supersede the rates designated in a private contract between the electric light company and a customer entered into prior to the making of the order by the Commission.

And in *Merchants, etc., Co. v. Missouri*, p. 124, same number, the Court holds that a law imposing a fine upon any person or corporation—other than a duly authorized and bonded state weigher issuing any weight certificate for any grain weighed at any warehouse or elevator, where duly appointed, etc., was not in conflict either with the 14th Amendment or the Commerce Clause of the Constitution, even though the grain was received from or shipped to points without the State. To both of these decisions we unhesitatingly give the great weight of our approval.

And yet in *U. S. v. Hill*, p. 165, where a State permits the bringing into it for personal use a quart of intoxicating liquor, the Court holds that the Reed Amendment having forbidden interstate traffic in intoxicating liquor the State law is nullified. It is true this is a liquor case and not to be judged by any rule of logic, reason or precedent. Mr. Justice McReynolds, with whom Clarke, J., concurs, dissents as follows:—

“When Hill carried liquor from Kentucky into West Virginia for his personal use, he did only what the latter state permitted. Construed as forbidding this action because West Virginia had undertaken to forbid manufacture and sale of intoxicants, the Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddling with the state’s internal affairs. Whether regarded as reward or punishment for wisdom or folly in enacting limited prohibition, the amendment so construed, I think, goes beyond Federal power; and to hold otherwise opens possibilities for partial and sectional legislation which may destroy proper control of their own affairs by the several states.

If Congress may deny liquor to those who live in a state simply because its manufacture is not permitted there, why may not this be done for any suggested reason, e. g., because the roads are bad, or men are hanged for murder, or coals are dug. Where is the limit?

The Webb-Kenyon Law, upheld in *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326, L. R. A. 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845, is wholly different from the act here involved. It suspends, as to intoxicants moving in interstate commerce, the rule of freedom from control by state action which the courts infer from congressional silence or failure specifically to regulate. 'The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.' *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 508, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 119, 34 L. ed. 128, 136, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681. In plain terms, it permits state statutes to operate, and thereby negatives any inference drawn from silence. The Reed Amendment as now construed is a congressional fiat imposing more complete prohibition wherever the state has assumed to prevent manufacture or sale of intoxicants."

The fact of the matter is that on any question of this character the Supreme Court seems to have harked back to the old rule of the Chancellor's thumb and determines each case on its own merits or demerits regardless of precedent. Maybe after all this is the best way—certainly for lawyers, as they can advise appeals in all cases.

The much vexed question of the right of a jury to inspect specimens of handwriting proved to be genuine for purpose of comparing them with a questioned document, has been at last definitely answered in favor of such a right in the case of *Keister's Ex'rs v. Philips' Ex'x*, decided by our Supreme Court of Appeals on March 13th, 1919. Seldom has there been a question more discussed and the decisions were as confusing as was often the discussion of the subject. In many of the states statutes had been enacted permitting such examination and it had been stated in the annotation to *University of Illinois v. Spaulding*, 62 L. R. A. 817, that such comparison was allowed in every state but North Carolina and Louisiana.

This statement was not absolutely accurate. Our Supreme Court had held that expert testimony could be received by the jury to test by comparison disputed handwriting with other writings admitted or proved to be genuine. *Hannot v. Sherwood*, 82 Va. 1; *Johnson's case*, 102 Va. 927, which two cases questioned *Rowt v. Kyle*, 1 Leigh 216, and *Burness v. Commonwealth*, 27 Gratt. 934. Our Supreme Court in the instant case directly and in terms overrules these last two cases. And very properly so. Never was a rule established upon a flimsier pretext or more illogical grounds. Expert testimony of course is very valuable in the examination of questioned handwritings and with the aid of photography and the magnifying lantern much fraud has been detected and the art of distinguishing false from genuine handwriting has been elevated almost into a science.

The very interesting and illuminating book of Mr. Albert S. Osborn, "Questioned Documents" on this subject has shown that—unlike most expert testimony—the testing of handwriting can be demonstrated to be wellnigh certain.

And yet comparison is one of the methods the expert uses, and is one that even the untrained eye can easily judge by, with little or no aid from extraneous sources.

Under our Statute Code, Sec. 3388, juries being allowed to take all documents introduced in evidence with them in the jury room, they generally compared handwriting anyway if they had specimens before them, despite the warning sometimes erroneously given them that they should not do so.

We are glad to see that Virginia has settled the question in the right way, and the only question which can now be raised is as to the genuineness of the specimens of handwriting submitted for the jury's inspection.

It may not be uninteresting to know that the decision of the English courts, so long and so foolishly followed, had its origin in the horror of the judicial murder of Sidney in 1683 by the notorious Judge Jefferies. *Algernon Sidney's Trial*, 9 How. St. Tr. 851, etc. He permitted such evidence to go before the jury, but the papers submitted were outrageous forgeries. Mr. Justice Coleridge of the King's Bench definitely formulated the er-

roneous rule in the case of *Doe d, Mudd v. Luckermore* (5 Ad. & El. 705), and the stream of justice may be said to have become "muddied" from that time.

One will seldom find a clearer discussion of the subject than that of Hon. Edward Twistleton in his work on the Letters of Junius, "Handwriting of Junius," but being too long to quote we refer those who are interested in the subject to that work pp. LXI, LXII.

The decision of the Supreme Court of the United States in *International News Service v. Associated Press*; 39 Sup. Ct. 68, is probably one justified by the facts

Property In News. Mr. Justice Brandeis' Dissent. in the case, but no one can read the dissenting opinion of Mr. Justice Brandeis in that case without coming to the conclusion that it is another case of judge-made law.

It is true Mr. Justice Pitney—who delivered the opinion of the Court—states that he spent no time upon the general question of property in news matter at the Common Law, or the application of the Copyright Act, since it seemed to the majority of the Court that the case turned upon the question of unfair competition in business, and yet he frankly states that "in order to sustain the jurisdiction of equity over the controversy we need not affirm any general and absolute property in the news as such. The rule that a court of equity concerns itself only in the protection of property rights treats any civil right of a pecuniary nature as a property right"—citing numerous cases—"and the right to acquire property by honest labor or the conduct of a lawful business, is as much entitled to protection as the right to guard property already acquired"—citing cases. "It is this right that furnishes the basis of the jurisdiction in the ordinary case of unfair competition."

But Mr. Justice Brandeis, answering this argument says:

"The knowledge for which protection is sought in the case at bar is not of a kind upon which the law has heretofore conferred the attributes of property; nor is the manner of acquisition or use nor the purpose to which it is applied such

as has heretofore been recognized as entitling a plaintiff to relief." * * *

"The great development of agencies now furnishing country-wide distribution of news, the vastness of our territory, and improvements in the means of transmitting intelligence, have made it possible for a news agency or newspapers to obtain, without paying compensation, the fruit of another's efforts, and to use news so obtained gainfully in competition with the original collector. The injustice of such action is obvious. But to give relief against it would involve more than the application of existing rules of law to new facts. It would require the making of a new rule in analogy to existing ones. The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies or by expanding a rule or principle. This process has been in the main wisely applied and should not be discontinued. Where the problem is relatively simple, as it is apt to be when private interests only are involved, it generally proves adequate. But with the increasing complexity of society, the public interest tends to become omnipresent; and the problems presented by new demands for justice cease to be simple. Then the creation or recognition by courts of a new private right may work serious injury to the general public, unless the boundaries of the right are definitely established and wisely guarded. In order to reconcile the new private right with the public interest, it may be necessary to prescribe limitations and rules for its enjoyment; and also to provide administrative machinery for enforcing the rules. It is largely for this reason that, in the effort to meet the many new demands for justice incident to a rapidly changing civilization, resort to legislation has latterly been had with increasing frequency."

The Justice then goes on with great force to demonstrate that this was a case that called for legislative rather than judicial action and alluded to the refusal of the United States Senate to report favourably on a bill to give news a few hours of protection, as an evidence such action might open the door to other evils greater than that sought to be remedied and concludes with the following cogent reasons why the Court should have declined to interfere in the present case.

"Courts are ill-equipped to make the investigations which should precede a determination of the limitations which

should be set upon any property right in news, or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred, or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly disclosed wrong, although the propriety of some remedy appears to be clear."

Mr. Justice Holmes with whom Mr. Justice McKenna concurs, delivers an opinion in which he in the main agrees with the majority of the Court, but thinks it went too far. He thinks that legislation might be necessary to correct the evil which, in his judgment, consists in not giving credit to the source from which the news is obtained. "I think," said he, "that within the limits recognized by the decision of the Court the defendant should be enjoined from publishing news obtained from the Associated Press for hours after its publication by the plaintiff unless it gives express credit to the Associated Press; the number of hours and form of acknowledgment to be settled by the District Court."

Which seems to us an admission by these two learned Justices Holmes and McKenna that the Court must legislate—not decide—for this would be practically what the District Court would have to do, if it carries out this suggestion.

It will be noted that our Associate Editor took a somewhat different view of the case in our March number.

CORRECTION.

In the note prefacing the April Editorials Lieutenant Wm. Eskridge Duke was erroneously spoken of as a *Second* Lieutenant. He is a *First* Lieutenant in the 80th Field Artillery at present at Pont-a-Mousson, France.